Supreme Court, U.S.

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No. 00-

IN THE

Supreme Court of the United States

BERNARD ROSENBLATT as Applicant for AVW, INC. d/b/a ADULT VIDEO MEGAPLEXXX,

Petitioner,

v.

THE CITY OF HOUSTON, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

RICHARD ALAN ANDERSON
Of Counsel
BURLESON, PATE & GIBSON, L.L.P.
Attorney for Petitioner
2414 North Akard, Suite 700
Dallas, Texas 75201
(214) 871-4900

166455

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COPY

QUESTIONS PRESENTED

I. Whether the Texas Courts' opinion construing a sexually oriented business licensing ordinance to allow for a rehearing from an administrative appeal decided adversely to the City is in conflict with the principle articulated in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), where the ordinance does not expressly provide for rehearings, and hence, does not expressly provide for any procedural safeguards in a rehearing context

II. Whether consistent with the provisions limiting restrictions on free speech, the Texas Courts' opinion holding that an adult arcade cannot use video technology to satisfy a sexually oriented business ordinance provision requiring "direct line of sight" from a manager's station into arcade booths is in conflict with the principle articulated in *Maryland v. Craig*, 497 U.S. 836 (1990).

STATEMENT PURSUANT TO RULE 29.6

AVW, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioner respectfully Petitions for Writ of Certiorari to review a panel opinion of the Thirteenth Court of Appeals of the State of Texas and the decision of the Texas Supreme Court to deny review of that Opinion.

OPINIONS BELOW

On October 19, 2000, a panel of the Court of Appeals for the Thirteenth District of Texas issued an opinion upholding the City of Houston's denial of a Sexually Oriented Business Permit to allow Petitioner to operate an adult arcade at his place of business in the City of Houston, pursuant to Houston Sexually Oriented Business Ordinance. The opinion of the Court of Appeals for the Thirteenth District (Appendix A) is reported at 31 S.W. 3d 399 (Tex. App. - Corpus Christi 2000). The decision of the Hearing Official, dated September 22, 1998, is not reported and is reprinted as Appendix B. A Petition for Review of that panel opinion was sought in the Supreme Court of Texas, and was denied on February 1, 2001. (Appendix C).

STATEMENT OF JURISDICTION

The denial of the Petition for Review by the Supreme Court of Texas was entered February 1, 2001. No motion for rehearing was requested or granted.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment One, United States Constitution: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for redress of grievances.

The relevant portions of the City of Houston's Ordinance 97-75 are reprinted in Appendix D.

STATEMENT OF THE CASE

Petitioner is an adult bookstore in the City of Houston with adult video arcades. This case is an appeal of an administrative hearing officer's determination denying Petitioner an application for an "adult arcade" permit, pursuant to interpretations of two separate provisions of the City of Houston's Sexually Oriented Business Ordinance (Appendix D).

Petitioner installed video cameras in each of the video rooms, with a monitor at the manager's station, to comply with the "direct line of sight" provisions of Sec. 28-101 of the Houston Ordinance (Appendix D). Although this video technology allowed a far superior view from the manager's station than removing the doors on the video rooms, the City of Houston took the position that "direct line of sight" had to be with a naked eye as opposed to video technology. The City of Houston denied Petitioner's arcade permit. At an evidentiary hearing pursuant to Sec. 28-99 of Art. II of the Ordinance, the hearing officer initially ruled in favor

of Petitioner. The City filed a motion to reconsider and the hearing officer reversed his earlier decision and affirmed the denial of the permit. Petitioner appealed his decision by filing suit in a Civil District Court in Houston. The suit was never heard on its merits as the District Judge entered an order granting the City of Houston's Motion for Summary Judgment. Petitioner timely appealed the ruling of the trial court, and the appeal was assigned to the Thirteenth Court of Appeals in Corpus Christi, Texas. On October 19, 2000 in a published Opinion (Appendix A), the trial court was affirmed. Petition for Review was denied by the Supreme Court of Texas on February 1, 2001 (Appendix C).

REASONS FOR GRANTING THE WRIT

The first issue before this Court presents a two part question of first impression of whether: (1) a sexually oriented business licensing ordinance may, consistent with the First Amendment, be construed to provide for administrative rehearings of an administrative appeal decided adversely to the City, and if so; (2) whether that rehearing must provide the procedural safeguards mandated by this Court in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990). Petitioner respectfully submits that with regard to the first part of the question, in construing a sexually oriented business licensing scheme to allow for rehearings of an administrative appeal decided adversely to the City, the Texas Courts have decided an important question of federal constitutional law that has not been, but should be, settled by this Court. With regard to the second part of the question, Petitioner respectfully submits that by construing the ordinance to allow for rehearings of an administrative appeal decided adversely to the City, where the ordinance does not expressly provide for any procedural safeguards in a

rehearing context, the Texas Courts have effectively decided an important federal constitutional issue in a way that directly conflicts with this Court's decision in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990).

The second issue presented to this Court poses another question of first impression regarding the use of video technology as a permissible substitute for a literal naked eye "direct line of sight" requirement contained in a sexually oriented business ordinance. Specifically, in *Maryland v. Craig*, 497 U.S. 836 (1990), this Court held that the literal definition of the word "confront" as envisioned by the confrontation clause of the Sixth Amendment, could not in and of itself, preclude the use of video technology if such technology was sufficient to satisfy the purpose of the Sixth Amendment. In the instant case, the Texas Courts relied on the literal definition of the word "direct" as contained in the "direct line of sight" provision of the Houston Sexually Oriented Business Ordinance to prohibit the use of video technology to satisfy the terms and purpose of the ordinance. In so doing, the Petitioner respectfully submits that the Texas Courts' opinion is inconsistent with the First Amendment, United States Constitution, and effectively reached a conclusion that is in direct conflict with this Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990).

ARGUMENT AND AUTHORITIES

I. HOUSTON, TEX., MUNICIPAL CODE ORDINANCE 97-75, ON ITS FACE AND AS CONSTRUED BY THE TEXAS COURTS, IS UNCONSTITUTIONAL IN VIOLATION OF THE FIRST AMENDMENT, UNITED STATES CONSTITUTION AND THE PRINCIPLE ARTICULATED BY THIS COURT IN *FW/PBS v. CITY OF DALLAS*, 493 U.S. 215 (1990).

Petitioner submits that to the extent Article II of Ordinance 97-75 is construed to permit administrative rehearings of an administrative appeal decided adversely to the City, as the Texas Courts have held, it is unquestionably violative of the First Amendment to the United States Constitution, and the principle articulated by this Court in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990).

Initially, it is crucial to bear in mind that the Houston Sexually Oriented Business Ordinance does not in any way provide for a rehearing from a decision of an administrative appeal. *A fortiori*, the Houston ordinance does not provide any of the procedural safeguards mandated in *FW/PBS* in a rehearing context. It is the Petitioner's position that, although this Court has never addressed the specific issue of the constitutionality of rehearings from administrative appeals decided adversely to the City in a sexually oriented business licensing scheme context, the language employed by this Court in *FW/PBS*, *supra*, leaves absolutely no doubt that any rehearing must expressly provide the procedural safeguards set forth in the *FW/PBS* decision.

In *FW/PBS* those procedural safeguards were unequivocally stated as follows:

> The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license *within a specified and reasonable time period during which the status quo is maintained and there must be the possibility of prompt judicial review* in the event that the license is erroneously denied. See *Freedman*, *supra*, at 51, 13 L.Ed.2d 649, 85 S.Ct. 734. See also *Shuttlesworth [v. City of Birmingham]*, 394 U.S. [147], at 155, n.4, 22 L.Ed.2d 162, 89 S.Ct. 935 [(1969)] (content-neutral time, place, and manner regulation must provide for "expeditious judicial review"); *National Socialist Party of America v. Skokie*, 432 U.S. 43, 53 L.Ed.2d 96, 97 S.Ct. 2205 (1977).

493 U.S. at 228-229 (emphasis added).

Since the Houston ordinance provides no mechanism whatsoever for a rehearing of an administrative appeal, it obviously fails to mandate that the administrative hearing officer render his decision on the rehearing "within a specified and reasonable time period during which the status quo is maintained." Additionally, it necessarily follows that there is no safeguard assuring the applicant of "the possibility of prompt judicial review".

Faced with this dilemma, the Texas Court of Appeals remarked:

> Appellant contends there is no possibility for prompt judicial review as required by *FW/PBS* if a hearing officer may conduct unlimited rehearings. The ordinance requires the hearing officer to render a written decision within five days of the conclusion of the hearing. **HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-125(e).** In the event that the hearing official does not give timely notice of his decision, the applicant is entitled to a temporary permit upon written demand, which is valid until the third day after the hearing official gives notice of his decision on the appeal. **HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-125(f).** Thus, if the hearing officer fails to issue a written order within five days of the hearing because of a motion for rehearing or reconsideration, the applicant is entitled to a temporary permit upon written demand. We conclude the ordinance provides prompt judicial review as required by *FW/PBS* and is not a prior restraint on First Amendment speech. Appellant's third issue is overruled.

Appendix A, pp. 19-20.

As expressly stated by the Texas Court of Appeals in the foregoing passage, it is beyond dispute that the very premise upon which the Texas Court based its decision was an examination of the procedural safeguards set forth in *Houston, Tex., Municipal Code, Ord. 97-75, § 28-125(e) and § 28-125(f).* But not only do the sections referred to by the

Texas Court have no application in a *rehearing* context, moreover, those sections are contained in a separate portion of the ordinance and have absolutely nothing to do with the portion of the ordinance pursuant to which this Petitioner's appeal from its permit denial was taken. In order to fully appreciate the veracity of this contention, a careful review of Ordinance No: 97-75 is required.

Ordinance 97-75 was specifically and unambiguously enacted containing two separate articles; designated as "Article II" and "Article III". Article II deals exclusively with "Adult Arcades and Adult Mini-Theatres" (*see* Sections 28-81 through 28-116, inclusive), whereas Article III deals exclusively with "Sexually Oriented Businesses". Each article has its own definitional section, and each has its own provisions for a permit application and for appellate procedures for denial of a permit. Indeed, neither the term "Adult Arcade" nor the term "Adult Mini-Theatre" is even contained within the definitional section of Article III. Moreover, the mutual exclusiveness of Article II and Article III is recognized by the City of Houston itself, in that the city requires an establishment that falls within the definition of a "Sexually Oriented Business", that also has an "Adult Arcade" as defined by Section 28-81 of Article II, to obtain *two* permits; one pursuant to Article II, and one pursuant to Article III. This contention is underscored by the very fact that the Petitioner in this case has applied for *and received* a permit pursuant to Article III to operate as a "Sexually Oriented Business". It is *only* the denial of Petitioner's application for an "Adult Arcade" permit pursuant to Article II that was at issue before the Texas Court of Appeals, and which is currently at issue before this Court. In short, the Texas Courts utilized the procedural safeguards set forth in Article III relating only to "Sexually Oriented Businesses"

to uphold the vastly different and mutually exclusive procedural safeguards specifically set forth in Article II relating only to "Adult Arcades".

The procedural safeguards expressly contained in Article II (again, the *only* Article with which we are concerned), are set forth in Section 28-99. The procedural safeguards that are expressly contained in Article III (again, the Article that has *nothing* to do with this case but which was exclusively relied upon by the Texas Courts in reaching their decisions) are set forth in Section 28-125(e) and Section 28-125(f). This distinction is crucial in our analysis, because for whatever reason existed in the collective mind of the Houston Legislature, very different procedures were enacted for Article II than were enacted for Article III.

Article II, Section 28-99(b) provides:

> Upon receipt of an appeal, the police chief shall refer the matter to the hearing officer for scheduling. If it will not be possible to hear and resolve the appeal within ten (10) days after the date it was received by the police chief, then the police chief shall issue a temporary permit until the matter *can be heard.*

Article II, Section 28-99(b) (emphasis added).

The unequivocal language of Section 28-99(b) provides for a temporary permit for an "Adult Arcade" until the matter can "be heard", but unlike *Article III* Section 28-125(e), there *is no* requirement that the hearing officer *issue his/her decision* within any specific time period. As a result, on its face Section 28-99(b) of Article II only provides for a

temporary permit until the hearing officer actually conducts the hearing, but this temporary permit expires before any decision is rendered, and since there is no requirement for the decision to be rendered within a "specified and reasonable time period during which the status quo is maintained" as mandated by *FW/PBS*, Article II is clearly unconstitutional. Correspondingly, since there is no possibility of "prompt Judicial Review" as required by *FW/PBS* it is also unconstitutional for its failure to provide this required procedural safeguard.

Additionally, Section 28-125(f) of Article III, another Section expressly relied upon by the Texas Courts to uphold *Article II* in a rehearing context, specifically provides for a temporary permit to be valid until the third day after the director gives notice of his action on the application "or the hearing officer gives notice of his *decision* on the appeal". As previously mentioned, for whatever reason existed in the mind of the Houston Legislature, the procedural safeguard set forth in Section 28-125(f) of Article III was specifically *omitted* from Section 28-99 of Article II, and this specific omission unquestionably renders Section 28-99 unconstitutional. *See, e.g., FW/PBS, supra*; *see also Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994); *NightClubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *Young v. City of Roseville*, 78 F. Supp. 2d 970 (D. Minn. 1999).

Finally, it should be noted that the City of Houston's argument advanced in the Texas Courts to the effect that the procedures set forth in Article II are supplemental to those procedures set forth in Article III cannot withstand scrutiny. The procedures set forth in Article II actually *contradict* the procedures set forth in Article III. For example, Section 28-

99 of Article II provides completely different time frames for dealing with various appellate matters regarding the denial of an "Adult Arcade" permit, than does Section 28-125 of Article III dealing with the identical appellate matters regarding the denial of a "Sexually Oriented Business" permit.

Based on the foregoing analysis, it is abundantly clear that the Houston Legislature enacted very different procedures for a permit application dealing with an "Adult Arcade" and a permit application dealing with a "Sexually Oriented Business". Moreover, it is equally obvious (but legally irrelevant) that the legislature provided these very different procedures intentionally. This is evident by the legislature's incorporation of *some* procedural safeguards contained in Article III by *express* reference to Article III as illustrated by Section 28-116 of Article II. This Section expressly incorporates the Judicial Review procedures set forth in Section 28-135 of Article III into the Article II process. As such, had the legislature intended to incorporate the required procedural safeguards contained in Sections 28-125(e) and 28-125(f) of Article III into Article II, it certainly knew how to do so.

In light of the foregoing, it is respectfully submitted that pursuant Rule 10(c) of the Rules of the United States Supreme Court, this Honorable Court should grant the Petition.

II. THE TEXAS COURTS HOLDING THAT VIDEO TECHNOLOGY COULD NOT BE USED TO SATISFY THE "DIRECT LINE OF SIGHT" REQUIREMENT CONTAINED IN THE HOUSTON SEXUALLY ORIENTED BUSINESS ORDINANCE IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *MARYLAND v. CRAIG*, 497 U.S. 836 (1990).

Section 28-101 of Article II of the Houston Sexually Oriented Business Ordinance provide in relevant part:

> (A) "If an adult arcade or an adult mini-theater has one manager station designated to pursuant to Sec. 28-92(c) of this Code, then the *interior of the adult arcade or adult mini-theater shall be configured in such a manner that there is an unobstructed view of every area of the adult arcade or adult mini-theater to which any patron is permitted access for any purpose from that manager's station. . . .*" *The view required in this subsection must be by direct line of sight from the manager's station.*
>
> (B) "It shall be the duty of the owners and operators, and it shall also be the duty of any agents or employees present in the adult arcade or adult mini-theater, to insure that the *view area specified in subsection (a) remains unobstructed by any merchandise, display racks or other materials at all times that any patron is present in the adult arcade or adult mini-theater. . . .*" Houston, Texas, Municipal Code, Ordinance 97-75, Sec. 28-101 *(emphasis added)* (Appendix A, pages 2,3).

Evidence submitted by the Petitioner before the Texas trial court established that video cameras were installed at each of the arcade booths to comply with the direct line of sight provisions, that the cameras in the arcades transmitted a picture of the inside of the arcade to a monitor located at the manager's station, that the video coverage is live and simultaneously transmits a picture to the manager's station of the inside of each and every arcade booth, as well as the hallway access to the arcade booths, and that patrons to the adult arcade booth were advised in writing that their activities were being monitored by a video camera and that lewd conduct of any kind was not permitted.

Despite the foregoing evidence, and relying on the definition of "direct" as set forth in Black's Law Dictionary, the Texas Courts held that the "direct line of sight" requirement could not be satisfied by the use of a medium or intervening agency such as video camera technology, even if such video camera technology in fact gave a better view of the areas to which patrons had access than by taking the doors off of the arcade. (Appendix A, pages 7-9).

The Texas Courts exclusive reliance on the literal definition of the word "direct" in rejecting the concept of video technology to satisfy the requirements of the ordinance is in direct conflict with the principle articulated by this Court in *Maryland v. Craig*, 497 U.S. 836 (1990), and ignores the fact that the definition contained in Black's Law Dictionary predated not only this Court's decision in *Craig*, but predated the entire concept of sophisticated video technology itself. In *Craig*, this Court rejected the approach of simply looking to the literal definition of the term "confront" as contained in the Confrontation Clause of the Sixth Amendment to the United States Constitution, and instead focused on the central

concern and purpose of the Confrontation Clause to determine if the use of video technology adequately served that central concern and purpose.

It is submitted that the intent of the Ordinance was to make the owners and its agents of the adult arcade responsible for the activities of any patrons in the arcade so that criminal penalties of the Ordinance, and other Texas statutes, could attach to the owner and its agents. Obviously, knowledge of those activities is in the central requirement before imposing responsibility. The use of live simultaneous video technology in which the view in the arcade booth is directly in front of the employee on the monitor at the manager's station, more than substantially complies with the goal of the Ordinance. It should be the election of the disseminator, as long as the goals of the Ordinance are in substantial compliance, to decide the manner of dissemination of presumptively protected materials. Certainly, if video camera technology can be used to comply with the definition of "confrontation" which is an essential component of our Bill of Rights [Sixth Amendment, United States Constitution; *see Ohio v. Roberts*, 498 U.S. 56, 69 (1980)], then the use of such video technology should substantially comply to satisfy the definitional term "direct line of sight" of a municipal ordinance.

It is respectfully submitted that pursuant to Rule 10(c), Rules of the United States Supreme Court, this Honorable Court should grant the Petition.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD ALAN ANDERSON
Of Counsel
BURLESON, PATE & GIBSON, L.L.P.
Attorney for Petitioner
2414 North Akard, Suite 700
Dallas, Texas 75201
(214) 871-4900

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS, CORPUS CHRISTI DATED AND FILED OCTOBER 19, 2000

COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI

NUMBER 13-99-692-CV

BERNARD ROSENBLATT, AS APPLICANT FOR AVW, INC., D/B/A ADULT VIDEO MEGAPLEXXX,

Appellant,

v.

CITY OF HOUSTON,

Appellee.

On appeal from the 189th District Court of Harris County, Texas.

OPINION

Before Justices Hinojosa, Yañez, and Rodriguez
Opinion by Justice Rodriguez

Bernard Rosenblatt, as applicant for AVW, Inc. d/b/a Adult Video Megaplexxx, appellant, appeals from the granting of a motion for summary judgment. Appellant challenges the summary judgment by seven issues. We affirm.

Appendix A

Adult Video Megaplexxx (Megaplexxx) is an adult bookstore located in Houston, Texas. It contains adult video arcades[1] where customers can enter booths to watch sexually explicit videos. In 1997, the City of Houston (the City) enacted Ordinance 97-75, which amended chapter 28 of its municipal code, having to do with sexually oriented businesses. Section 28-10, which is found in division 3 governing adult arcade and adult mini-theatre design, provides as follows:

> (a) If an adult arcade or adult mini-theatre has one (1) manager's station designated pursuant to section 28-92(c) of this Code, then *the interior of the adult arcade or adult mini-theatre shall be configured in such a manner that there is an unobstructed view of every area of the adult arcade or adult mini-theatre to which any patron is permitted access for any purpose from that manager's station.* If an adult arcade or adult mini-theatre has two (2) or more manager's stations designated pursuant to section 28-92(c) of this Code, then the interior of the adult arcade or adult mini-theatre shall be configured in such a manner that there is an unobstructed view of each area of the adult arcade or adult mini-theatre to which any patron is permitted access for any purpose from at least one (1) of the manager's

1. "Adult arcades" are establishments containing "coin- or slug-operated or electronically or mechanically controlled machine[s] or device [s]" that dispense adult entertainment intended for viewing by five or fewer persons. HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-81.

stations. *The view required in this subsection must be by direct line of sight from the manager's station.*

(b) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in an adult arcade or adult mini- theatre, to ensure that the *view area specified in subsection (a) remains unobstructed by any merchandise, display racks or other materials at all times that any patron is present in the adult arcade or adult mini-theatre* and to ensure that no patron is permitted access to any area of the adult arcade or adult mini-theatre which has been designated as an area in which patrons will not be permitted in the plan filed pursuant to section 28-92 of this Code.

HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-101(a) (emphasis added).

According to an affidavit of John Bratton, president of AVW, Inc., video cameras were installed in the arcade booths at Megaplexxx to comply with the "direct line of sight" provision of Ordinance 97-75. Bratton affied that "[t]he cameras in the arcades transmit a picture of the inside of the arcade to a monitor located in the manager's station. The video coverage is live, and simultaneously transmits a picture of the inside of each and every arcade, as well as the hallways." According to Bratton, "[p]atrons are advised in writing that their activities are being monitored by a video camera, and that Adult Video Megaplexxx does not permit lewd conduct of any kind."

Appendix A

According to an officer of the Houston Police Department, Vice Division, during an inspection of Megaplexxx, he observed there is not an unobstructed view of every area to which a patron is permitted access. He also observed there was not a direct line of sight from the manager's station and that the arcades have doors. Appellant does not contest that, without the use of video surveillance, there is no direct, unobstructed view from the manager's station to each area of the adult arcade or adult mini-theatre to which any patron is permitted access.

Appellant applied for an adult arcade/adult mini-theater permit with the City. The City denied the application by written letter on July 15, 1998. According to the letter, the City denied the permit because (1) "[the] adult arcade is in violation of Section 28-93(b)(1)[2] of the Adult Arcade/Adult Mini-Theater Ordinance having to do with the view design, and lighting requirements [,]" and (2) "the application . . . submitted is in violation of Section 28- 92(c)."[3]

Appellant pursued an appeal as authorized by the ordinance. A hearing was held on the appeal on August 19, 1998, and the hearing officer[4] concluded by stating, "I'm

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2. Section 28-93(b)(1) of the ordinance authorizes the denial of permits when adult arcades or adult mini-theatres do not comply with division 3 of the article. Division 3 includes sections 28-101 (view from the manager's station), 28-102 (wall penetrations), and 28-1023 (lighting).

3. Section 28-92(c) requires applicants to submit a diagram of the arcade or mini-theatre.

4. The hearing officer is an official who is appointed by the mayor and confirmed by the city council. HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-113.

going to hold that the denial of the permit was improper and then maybe [City] Council can straighten this out." On August 24, 1998, the City moved for the hearing officer to reconsider and uphold the denial of the permit. Appellant responded to the motion for reconsideration on August 26, 1998. On September 22, 1998, the hearing officer reversed his prior ruling and signed a decision affirming the denial of the permit. The decision states that the denial of the permit "was based upon violations of Section 28-101(a); Adult Video Megaplexxx Arcade's internal configuration does not permit an unobstructed view from the manager's station by direct line of sight of every area of the adult arcade to which patrons are permitted access." Thereafter, appellant appealed the hearing officer's decision to a district court in Harris County. Both parties moved for summary judgment. The court granted the City's motion for summary judgment without specifying the grounds on which it was rendered. This appeal ensued.

The proper inquiry on appeal is whether the defendant, in seeking summary judgment, fulfilled his initial burden (1) to establish as a matter of law that there remained no genuine issue of material fact as to one or more essential elements of the plaintiff's cause of action or (2) to establish his affirmative defense to the plaintiff's cause of action as a matter of law. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985); *Pena v. State Farm Lloyds*, 980 S.W.2d 949, 953 (Tex. App. – Corpus Christi 1998, no pet.). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant must be taken as true. *Nixon*, 690 S.W.2d at

549. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in his favor. *Id.* In this case, the trial court granted summary judgment for the City; hence, we view all evidence favorable to appellant, the non-movant, as true and indulge every inference in its favor.

When there are multiple grounds for summary judgment and the order does not specify the ground on which the summary judgment was rendered, appellant must negate all grounds on appeal. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 381 (Tex. 1993). If the appellant fails to negate each ground on which the judgment may have been rendered, we must uphold the summary judgment. *Id.*

In its fourth and fifth issues, appellant avers the trial court erred in granting summary judgment because appellant was in full compliance with the ordinance as a matter of law, and there was a fact issue regarding whether appellant substantially complied with the ordinance.[5]

Appellant first maintains it complied with the direct line of sight provision of the ordinance by installing video cameras in the arcades. According to appellant, the video cameras afford the manager a direct line of sight inside the arcades. The City urges that the direct line of sight provision requires arcades to be visible from the manager's station without the use of a medium.

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5. Appellant also contends, alternatively, if appellant was not in substantial compliance with the ordinance, the ordinance infringed upon appellant's First Amendment rights because it was not narrowly tailored to protect the City's interest. For convenience, we shall address this argument after considering appellant's sixth and seventh issues.

Appendix A

The rules that apply to the construction of statutes apply as well to the construction of municipal ordinances. ***Wende v. The Board of Adjustment of the City of San Antonio***, No. 04-99-00577-CV, 2000 WL 1059643 *5 (Tex. App. – San Antonio 2000, no pet. h.) (citing ***Mills v. Brown***, 159 Tex. 110, 114, 316 S.W.2d 720, 723 (1958)). The cardinal rule of statutory construction is to discern and give effect to the intent of the enacting body. ***Sorokolit v. Rhodes***, 889 S.W.2d 239, 241 (Tex. 1994). We must first seek to discern that intent from the plain language of the statute or ordinance. *Id.*

The ordinance provides that there must be an unobstructed view of every area of the adult arcade or adult mini-theatre to which any patron is permitted access from the manager's station and this view must be by direct line of sight. The Houston City Council did not define direct line of sight in the ordinance; thus we use the commonly understood, everyday definition of the word direct when interpreting the ordinance. TEX. GOV'T CODE ANN. § 311.011 (Vernon 1998). Black's Law Dictionary defines direct as "[i]mmediate; proximate; by the shortest course; *without circuity*; operating by an immediate connection or relation, *instead of operating through a medium*; the opposite of indirect." BLACK'S LAW DICTIONARY 315 (6th ed. 1990) (emphasis added). Webster's Dictionary defines direct as "a proceeding from one point to another in time or space without any deviation or interruption . . . *marked by absence of an intervening agency,* instrumentality, or influence . . ." WEBSTER'S NEW COLLEGIATE DICTIONARY 571 (1981 ed.) (emphasis added).

Using the rules of construction, we presume the city council chose the words "direct line of sight" carefully and

intended for them to have meaning and purpose. As provided in the ordinance, therefore, the use of video cameras within enclosed booths does not satisfy the direct line of sight requirement because it involves the use of a medium and intervening agency.

Appellant responds that such an interpretation of direct is unreasonable, as it would result in a person from the manager's station not being able to use eyeglasses, which are arguably a medium, to view the arcades. We must avoid interpretations that would produce absurd results or render other language mere surplusage. *City of Amarillo v. Martin*, 971 S.W.2d 426, 430 (Tex. 1998) We do not believe by requiring a direct line of sight, the council sought to prohibit the use of eyewear to improve the line of sight. Unlike video cameras and monitors, eyeglasses do not transmit images; rather, they refine images. We conclude that from the plain language of the ordinance, the council did not intend for enclosed arcades with video surveillance to satisfy the design requirements of section 28-101(a).

The legislative history in this case further supports this conclusion. When construing a statute or ordinance, whether or not the statute is ambiguous on its face, we consider such matters as the object sought to be attained by the statute, the circumstances involved, the legislative history, the common law, former provisions, and laws on the same or similar subjects. TEX. GOV'T CODE ANN. § 311.023 (Vernon 1998); *Castle v. Harris*, 960 S.W.2d 140, 143 (Tex. App. – Corpus Christi 1997, no pet.); *Grothues v. City of Helotes*, 928 S.W.2d 725, 728 (Tex. App. – San Antonio 1996, no writ).

Appendix A

Attached to the City's motion for summary judgment is a transcript of a meeting held by the City's Sexually Oriented Business Committee, during which the committee discussed proposed ordinance 97-75. According to an attorney making a presentation to the committee, the purpose of the ordinance was to provide an open and unobstructed view of the arcades, and to prevent illegal sexual activity. Although doors were not expressly prohibited in the ordinance, according to one council member, they were effectively prohibited by the requirement that there be an open view of every area where customers are permitted. Appellee also attached the minutes of the committee during which a draft ordinance was reviewed section by section. There, the attorney stated, "[t]he point of the Adult Arcade Ordinance is to eliminate the use of enclosed booths for viewing of such materials for places involving illegal or sexual conduct . . . ."

We conclude appellant did not fully comply with the ordinance by installing video cameras in booths that were not open and visible from the manager's station without the use of a medium.

Appellant contends, alternatively, that it substantially complied with the ordinance. Substantial compliance has been defined to mean performance of the essential requirements of a statute. *Stratton v. Austin Ind. Sch. Dist.*, 8 S.W.3d 26, 31 (Tex. App. – Austin 1999, no pet. h.) (citing *Harris County Appraisal Dist. v. Krupp Realty Ltd., Partnership*, 787 S.W.2d 513, 515 (Tex. App. – Houston [1st Dist.] 1990, no writ)). A deviation from the requirements of the statute which does not seriously hinder the legislature's purpose in imposing the requirement is substantial compliance. *Id.*

According to appellant, the camera system allowed a manager to view the interior of the arcades better than the naked eye. Therefore, appellant contends, there is a fact issue regarding whether it substantially complied with the purpose of preventing illegal sexual activity in the arcades. However, as discussed, the council sought to provide an open, direct, and unobstructed view of the arcades from the manager's station. Although appellant may have had a means of monitoring the interior of its arcades, it did not afford a "direct line of sight" view from the manager's station as set forth in the ordinance. Thus, it did not comply with an essential requirement of the ordinance. Significantly, the council may have reasoned that requiring arcades to be open, notwithstanding any video surveillance, would remove the feeling of privacy its occupants might otherwise have, thereby discouraging illegal sexual activity.

The Fourteenth Court of Appeals has interpreted a predecessor of the present ordinance. *See City of Houston v. Mitchell*, 737 S.W.2d 370, 371-73 (Tex. App. – Houston [14th Dist.], 1987, writ denied). Like the present ordinance, that ordinance required "an unobstructed view of every area of the adult arcade to which any patron is permitted access for any purpose from that manager's station. . . . The view required . . . must be by direct line of sight from the manager's station." *Id.* The court concluded that the ordinance prohibited fully or partially enclosed booths. *Id.* at 372-73.

We conclude that an arcade which may be enclosed, but is monitored by video camera, does not substantially comply with the ordinance, which requires a direct line of sight. To

the extent that they do not encompass a First Amendment challenge of the ordinance, appellant's fourth and fifth issues are overruled.

Appellant contends, in its sixth issue, that there is a fact issue regarding whether the ordinance violates its rights under the First Amendment because the predominant purpose of the ordinance was to target the viewing of adult movies in arcades, which is protected speech under the First Amendment. By its seventh issue, appellant asserts the trial court erred in granting summary judgment because its argument that the ordinance violated the First Amendment was not barred by *res judicata*.

As appellee notes in its brief, and as it explained in its motion for summary judgment, the constitutionality of section 28-101 of the ordinance under the First Amendment was litigated in *N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754, 768 n.11 (S.D. Tex. 1998). In that case, a federal district court held that the structural, visibility, and lighting requirements in sections 28-101 and 128-103 were content-neutral and required intermediate level scrutiny. *Id.* at 827. The court concluded that the restrictions were narrowly tailored to serve the substantial governmental interest in decreasing public lewdness and prostitution inside sexually oriented businesses. *Id.* Thus, the court concluded these sections were facially valid under the First Amendment. *Id.*

Res judicata operates to prevent relitigation of claims that have been finally adjudicated, or could have been raised with proper diligence in the course of previous litigation,

that terminated in final judgment, over the same subject matter. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). When the first lawsuit at issue is decided in federal court, federal law controls the determination of whether res judicata bars the present state court proceeding. *San Antonio Ind. Sch. Dist. v. McKinney*, 936 S.W.2d 279, 281 (Tex. 1996); *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 718 (Tex. 1990). Under federal law, res judicata will apply if the parties are identical in both suits, the prior judgment is rendered by a court of competent jurisdiction, there is a final judgment on the merits, and the same cause of action is involved in both cases. *Russell v. SunAmerica Securities, Inc.*, 962 F.2d 1169, 1172 (5th Cir. 1992); *Eagle Properties, Ltd.*, 807 S.W.2d at 718. Because appellee raised res judicata as an affirmative defense at the summary judgment stage, it bore the burden of proving each of these elements conclusively. *See Johnson & Johnson Medical, Inc. v. Sanchez*, 924 S.W.2d 925, 927 (Tex. 1996).

Appellant was one of a multitude of plaintiffs in the federal suit against the City involving ordinance 97-75. *See N.W. Enterprises, Inc.*, 27 F.Supp.2d at 768 n.11. Thus, the parties are identical in both suits. Next, the judgment was rendered by a court of competent jurisdiction. Appellees attached appellant's petition from the suit in federal court in which appellant admits the court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The federal district court granted a partial summary judgment, concluding sections 28-101 and 28-103 were constitutional, by a written memorandum opinion. The opinion was eventually reduced to a final judgment. Thus, there was a final judgment on the merits.

Finally, we must consider whether the same cause of action was involved in the federal district court as in the present suit. In both cases, appellant challenged the constitutionality of the ordinance, arguing the ordinance targeted speech protected under the First Amendment. The court concluded the restrictions were content neutral, and that the requirements were facially valid under the First Amendment. Having previously litigated this claim in federal court, the doctrine of res judicata precludes appellant from raising it again.[6] Appellant's sixth and seventh issues are overruled.

We now return to appellant's fifth issue, in which it complains there is a fact issue regarding whether the ordinance was narrowly tailored to protect the City's interest in accordance with the First Amendment. This is an applied challenge in which appellant contends that because video surveillance is a method superior to the naked eye in monitoring arcades, an ordinance which requires a direct line of sight and precludes the use of video surveillance in enclosed booths is not narrowly tailored to further the City's interest.

Appellant urges that the ordinance is unconstitutional under *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Supreme Court announced that a governmental regulation does not infringe upon First Amendment rights if: (1) the regulation is within the constitutional power of

---

6. We note that appellant's applied challenge of the ordinance under the First Amendment, dealing with whether the ordinance was overbroad in precluding the use of video cameras to monitor arcades, has not been litigated and may be reviewed on its merits.

the government; (2) it furthers an important or substantial governmental interest; (3) the interest furthered is unrelated to the suppression of free expression; and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377; *see City of Dallas v. MD II Entertainment, Inc.*, 974 S.W.2d 411, 413 (Tex. App. – Dallas 1998, no writ). The *O'Brien* test does not require the government to use the "least intrusive means" of regulation. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800.

Appellant's challenge is limited to the fourth *O'Brien* factor. That is, appellant contends the restriction on First Amendment speech is greater than necessary to further the City's interest. We conclude the ordinance, by requiring a direct line of sight from the manager's station into arcades, does not place a restriction on First Amendment speech greater than that which is essential to the furtherance of the City's interest.

A city has a substantial interest in regulating sexually oriented businesses. *Adust Video v. Nueces County*, 996 S.W.2d 245, 253 (Tex. App. – Corpus Christi 1999, no pet.) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)). Requiring a direct line of sight from the manager's station into arcades, which necessarily prohibits enclosed arcades, regardless of video surveillance, places

little, if any, restriction on First Amendment speech. The restriction does not affect appellant's ability to show videos in the arcades nor its patrons' right to view them. *See id.* The restriction limits itself to visibility of patrons; it does not limit who may access the arcades, the content of the films shown in the arcades, the number of films shown, nor the hours during which the films are shown. The means chosen are not substantially broader than necessary to achieve the government's interest. Appellant's First Amendment challenge in issue five is overruled.

In its first issue, appellant contends the trial court's granting of summary judgment was improper because the City's notice that it was denying appellant's application for the permit did not comply with the specificity requirements of the ordinance. Section 28-93(d) of the ordinance provides, in relevant part, "[i]f a permit is denied, then a notice thereof setting forth the specific reasons therefor shall be given to the applicant and the owners." HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-93(d). In denying the permit, the City sent appellant a letter stating the following reasons for denial:

> (1) Your adult arcade is in violation of Section 28-93(b)(1) of the Adult Arcade/Adult Mini-Theater Ordinance having to do with the view, design, and lighting requirements.
>
> (2) The application that you submitted is in violation of Section 29-92(c).

Appellant contends, without citing any authority, that this notice does not satisfy the specificity requirement of

the ordinance. According to appellant, this notice was insufficient to apprise it of any infirmities it would have to defend against. An appellant has the burden to bring forth sufficient record and authority to support reversible error. TEX. R. APP. P. 38.1(h); *Pierce v. First Nat. Bank of Alvin*, 899 S.W.2d 365, 371 (Tex. App. – Houston [14th Dist.] 1995, no writ). A point of error not supported by authority is waived. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 934 (Tex. 1983); *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 280 (Tex. App. – Houston [14th Dist.] 1999, no pet.). Even if appellant had provided authority in support of its argument, its own letter of appeal belies its argument that it did not have notice. By appellant's letter of appeal dated July 23, 1998, it admitted that an officer of the Houston Police Department "orally confirmed that the 'view' and 'design' infirmities alleged[ly] relate to the installation of video cameras which allegedly fail to comply with the 'direct line of sight' provisions within Section 28-101 of the Ordinance. . . . [The officer] confirmed that [the violation of section 28-99] also relates to the alleged 'line of sight' violation." Thus, appellant had actual notice of the reasons for the denial of the permit prior to the hearing of August 19, 1998. Appellant has failed to show that the notice given did not comply with the specificity requirements of the ordinance, and that he lacked adequate notice to prepare a defense of the denial of the permit. Appellant's first issue is overruled.

By its second issue, appellant contends the trial court erred in granting summary judgment because the hearing officer erroneously held a second hearing on the appeal of the denial of the permit in contravention of the ordinance. According to appellant, the hearing officer lacked jurisdiction to conduct

a reconsideration of his initial ruling because the ordinance only provides for a single hearing. Section 28-99 of the ordinance governs appeals and provides that an applicant shall be entitled to a hearing. The ordinance refers to a hearing throughout in the singular. From this, appellant infers that the ordinance prohibits a second hearing or rehearing.

The granting of a rehearing by an administrative agency[7] is a discretionary matter. *Texas State Bd. of Dental Examiners v. Silagi*, 766 S.W.2d 280, 285 (Tex. App. – El Paso 1989, writ denied) (citing *Braswell Motor Freight Lines, Inc. v. United States*, 275 F.Supp. 98, 103 (W.D. Tex. 1967), *aff'd*, 389 U.S. 569 (1968)). Until an agency issues an effective final order, the agency retains jurisdiction over the matter and can withdraw previous orders and issue new ones. *Star Houston, Inc. v. Texas Dept. of Transp., Motor Vehicle Div.*, 957 S.W.2d 102, 106 (Tex. App. – Austin 1997, writ denied); *Lone Star Greyhound Park v. Texas Racing Comm'n*, 863 S.W.2d 742, 745-46 (Tex. App. – Austin 1993, writ denied).

In this case, when the trial court held the rehearing, it had not issued a written order as required by section 28-114. We conclude the hearing officer retained jurisdiction over the permit dispute to hold a rehearing. The hearing officer did not abuse its discretion in holding a rehearing. Appellant's second issue is overruled.

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7. An administrative agency is "[a] governmental body charged with administering and implementing particular legislation." BLACK'S LAW DICTIONARY 29 (6th ed. 1990). In the present case, the Houston City Council has authorized a hearing officer to consider appeals from the denial of permits. *See* HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, §§ 28-113, 28-114, 28-135.

Appendix A

Appellant argues, by its third issue, that the trial court erred in granting summary judgment because, to the extent the ordinance confers an implied right to conduct a second hearing on the denial of a permit, it violates the First Amendment to the United States Constitution by failing to provide time restraints on such additional hearings and orders. Appellant contends that if the ordinance permits the hearing officer to conduct reconsideration hearings, then it is unconstitutional on its face for failing to provide explicit time parameters within which a decision on the reconsideration must be rendered. Appellant cites *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), in furtherance of this argument.

In *FW/PBS*, the Supreme Court struck down a Dallas sexually oriented business ordinance as a prior restraint on the First Amendment, when it failed to provide a definite time limit for issuance of a license. *Id.* at 226-27. The Court held that two safeguards are essential for ordinances governing the issuance of licenses for First Amendment protected businesses: (1) "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and [(2)] there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228.

The ordinance in this case requires the chief of police to issue or deny a permit within twenty days of receipt of an application.[8] HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75,

8. The ordinance allows that the notice of issuance or denial of the permit may be extended until the thirtieth day after receipt of (Cont'd)

§ 28-93. Thus, the Houston ordinance, unlike the Dallas ordinance in *FW/PBS*, provides a definite and reasonable time limit for issuance of a license.

Appellant contends there is no possibility for prompt judicial review as required by *FW/PBS* if a hearing officer may conduct unlimited rehearings. The ordinance requires the hearing officer to render a written decision within five days of the conclusion of the hearing. HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-125(e). In the event that the hearing official does not give timely notice of his decision, the applicant is entitled to a temporary permit upon written demand, which is valid until the third day after the hearing official gives notice of his decision on the appeal. HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-125(f). Thus, if the hearing officer fails to issue a written order within five days of the hearing because of a motion for rehearing or reconsideration, the applicant is entitled to a temporary permit upon written demand. We conclude the ordinance provides prompt judicial review as required by *FW/PBS* and is not a prior restraint on First Amendment speech. Appellant's third issue is overruled.

(Cont'd)
the application if "the police chief upon notice to the applicant that the police chief has been unable, after diligent effort, to schedule the conduct of any required inspections of the adult arcade or adult mini-theatre with the liaison person designated therefor in the application by the nineteenth day next following the date of his receipt of the application." HOUSTON, TEX., MUNICIPAL CODE, Ord. 97-75, § 28-93.

Appendix A

The summary judgment is AFFIRMED.

NELDA V. RODRIGUEZ
Justice

Opinion delivered and filed
this the 19th day of October, 2000.

APPENDIX B — DECISION OF THE HEARING OFFICIAL OF THE CITY OF HOUSTON, COUNTY OF HARRIS, STATE OF TEXAS DATED SEPTEMBER 22, 1998

THE CITY OF HOUSTON
COUNTY OF HARRIS
STATE OF TEXAS

IN RE: THE SEXUALLY ORIENTED BUSINESS PERMIT APPLICATION OF BERNARD ROSENBLATT FOR ADULT VIDEO MEGAPLEXXX ARCADE

DECISION OF THE HEARING OFFICIAL

On August 6, 1998, the Hearing Officer considered the appeal submitted by Bernard Rosenblatt on July 23, 1998, regarding the denial of an Adult Arcade Permit to operate Adult Video Megaplexxx Arcade at 8100 North Freeway, Houston, Harris County, Texas as an "adult arcade" as that term is defined in Article II, Chapter 28, City of Houston Code of Ordinances. Bernard Rosenblatt appeared personally on behalf of Adult Video Megaplexxx Arcade and was represented by counsel. The City of Houston appeared through representatives of the Houston Police Department and was represented by counsel. The basis of the appeal was the director's denial of an Adult Arcade permit to operate Adult Video Megaplexxx Arcade.

The director's denial of the permit was based upon violations of Section 28-101(a); Adult Video Megaplexxx Arcade's internal configuration does not permit an unobstructed view from the manager's station by direct line of sight of every area of the adult arcade to which patrons are permitted access.

Appendix B

After reviewing the evidence and considering the arguments of counsel, the Hearing Official finds that the director's decision in this matter should be AFFIRMED.

Signed this 22nd day of September 1998.

s/ George Pletcher
George Pletcher
Hearing Official

APPENDIX C — LETTER OF THE SUPREME COURT OF TEXAS DENYING PETITION FOR REVIEW DATED FEBRUARY 1, 2001

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Austin Texas 78711
(512) 463-1312

February 01, 2001

Mr. Richard Alan Anderson
2414 N. Akard, Suite 700
Dallas, TX 75201

Mr. Richard B. Kuniansky
Dameris & Kuniansky
5051 Westheimer, Suite 700
Houston, TX 77056

Mr. Patrick Zummo
Three Allen Center
333 Clay Street, Suite 4100
Houston, TX 77002

RE: Case Number 00-1238
Court of Appeals Number: 13-99-00692-CV
Trial Court Number: 9849770

Style: IN THE MATTER OF BERNARD ROSENBLATT
as applicant for AVW, INC. d/b/a ADULT VIDEO MEGAPLEXXX
v.
THE CITY OF HOUSTON

Appendix C

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by s/ Blanca E. Morin
Blanca E. Morin, Deputy

cc: Ms. Cathy Wilborn, Clerk
Mr. Charles Bacarisse

APPENDIX D — EXCERPTS FROM SEXUALLY ORIENTED BUSINESS ORDINANCE OF THE CITY OF HOUSTON, ORDINANCE 97-75 ENACTED JANUARY 15, 1997

"ARTICLE II. ADULT ARCADES AND ADULT MINI-THEATRES

DIVISION 1. GENERALLY

Sec. 28-81. Definitions.

As used in this article, the following words shall have the meanings herein ascribed, unless the context of their use clearly indicates another meaning:

Adult arcade shall mean any premises that is subject to regulation under Chapter 243 of the Local Government Code, as amended, to which members of the public or members of any club, group or association are admitted and permitted to use one or more arcade devices.

Arcade device shall mean any coin- or slug-operated or electronically or mechanically controlled machine or device that dispenses or effectuates the dispensing of entertainment, that is intended for the viewing of five (5) or fewer persons in exchange for any payment of any consideration.

* * *

Entertainment shall mean:

(1) Any live exhibition, display or performance; or

Appendix D

(2) Any still picture(s) or movie picture(s), whether mechanically, electrically or electronically displayed; or

(3) Any combination of the foregoing, in which the specified anatomical areas or specified sexual activities are depicted.

* * *

Operator shall mean the individual who is principally in charge of the management of the adult arcade or adult mini-theatre.

* * *

Permit shall mean a current, valid permit issued by the police chief under this article to an operator for an adult arcade or adult mini-theatre.

Police chief shall mean the chief of police and any employee(s) of the police department assigned by him to perform the duties prescribed in this article.

* * *

Specified anatomical areas shall mean:

(1) Less than completely and opaquely covered:

a. Human genitals, pubic region or pubic hair; or

b. Buttock; or

c. Female breast or breasts or any portion thereof that is situated below a point immediately above the top of the areola; or

d. Any combination of the foregoing; or

(2) Human male genitals in a discernibly erect state, even if completely and opaquely covered.

Specified sexual activities shall mean:

(1) Human genitals in a state of sexual stimulation or arousal;

(2) Acts of human masturbation, sexual intercourse or sodomy;

(3) Fondling or other erotic touching of human genitals, pubic regions, buttock or female breast; or

(4) Any combination thereof.

* * *

DIVISION 2. PERMIT

Sec. 28-92. Application.

(a) To obtain a permit, whether initial or renewal, the intended operator of the adult arcade or adult mini-theatre

shall file an application with the police chief on a form prescribed by the police chief for that purpose. On the application, the applicant shall set forth the following information:

* * *

(b) The application shall contain the following statement:

> 'I represent that I have personal knowledge of all statements made in this application and all information furnished herewith and that all of the same is true and correct.'

(c) The application shall be accompanied by a diagram of the adult arcade or adult mini-theatre showing a plan thereof specifying the location of one or more manager's stations and the location of all overhead lighting fixtures and designating any portion of the adult arcade or adult mini-theatre in which patrons will not be permitted. A manager's station may not exceed thirty-two (32) square feet of floor area. Such diagram shall also designate the place at which the permit will be posted pursuant to section 28-91 (b) of this Code, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the adult arcade or adult mini-theatre to an accuracy of plus or minus six (6) inches.

The police chief shall waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the adult arcade or adult mini-theatre has not been altered since it was prepared.

(d) The application shall be sworn to be true and correct by the applicant.

* * *

(g) A separate permit shall be required for each adult arcade or adult mini-theatre, and a permit shall only be valid for the adult arcade or adult mini-theatre described in the application.

(h) Where a premises is so configured and operated as to constitute both an adult arcade and an adult mini-theatre, then the operator may apply for and obtain a combined permit authorizing operation as both an adult arcade and an adult mini-theatre.

* * *

Sec. 28-99. Appeals.

(a) Any applicant, operator or owner who is aggrieved by any decision of the police chief relating to his duties and authority under this division in the issuance of permits shall be entitled to a hearing to be conducted in the same manner specified in division 4 of this article for permit revocations, except that the grounds considered in the hearing shall be as

applicable under this article; provided, that a written notice of the request for the hearing setting forth the grounds must be received by the police chief within fifteen (15) days from the date that notice of the action complained of is given to the hearing applicant. The applicant, owner or operator shall be entitled to three (3) days' notice ~~at~~ of the date, time and place of the hearing.

(b) Upon receipt of an appeal, the police chief shall refer the matter to the ~~secretary of the general appeals board~~ hearing officer for scheduling. If it will not be possible to hear and resolve the appeal within ten (10) days after the date it was received by the police chief, then the ~~director of the planning and development department or one (1) of his assistants or deputies as designated by the said director shall act as hearing officer for disposal of the matter within the aforesaid time period~~ police chief shall issue a temporary permit until the matter can be heard; ~~unless all applicants on the appeal request in writing that the matter be continued with the general appeals board, notwithstanding the delay.~~

* * *

DIVISION 3. ADULT ARCADE OR ADULT MINI-THEATRE DESIGN

Sec. 28-101. View from manager's station.

(a) If an adult arcade or adult mini-theatre has one (1) manager's station designated pursuant to section 28-92(c) of this Code, then the interior of the adult arcade or adult mini-theatre shall be configured in such a manner that there

is an unobstructed view of every area of the adult arcade or adult mini-theatre to which any patron is permitted access for any purpose from that manager's station. If an adult arcade or adult mini-theatre has two (2) or more manager's stations designated pursuant to section 28-92(c) of this Code, then the interior of the adult arcade or adult mini-theatre shall be configured in such a manner that there is an unobstructed view of each area of the adult arcade or adult mini-theatre to which any patron is permitted access for any purpose from at least one (1) of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

(b) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in an adult arcade or adult mini-theatre, to ensure that the view area specified in subsection (a) remains unobstructed by any merchandise, display racks or other materials at all times that any patron is present in the adult arcade or adult mini-theatre and to ensure that no patron is permitted access to any area of the adult arcade or adult mini-theatre which has been designated as an area in which patrons will not be permitted in the plan filed pursuant to section 28-92(c) of this Code.

* * *

Sec. 28-116. Judicial Review.

The procedures set forth under section 28-135 of this Code shall apply to denials, suspensions and revocations of permits for adult arcades and adult mini-theatres under this article."

* * *

Appendix D

Sec. 28-121. Definitions.

As used in this article, the following words and terms shall have the meanings ascribed to them in this section, unless the context of their usage clearly indicates another meaning:

* * *

Adult bookstore. An establishment whose primary business is the offering to customers of books, magazines, films or videotapes (whether for viewing off-premises or on-premises by use of motion picture machines or other image-producing devices), periodicals, or other printed or pictorial materials which are intended to provide sexual stimulation or sexual gratification to such customers, and which are distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities, or specified anatomical areas.

* * *

Adult movie theatre. An establishment, containing a room with tiers or rows of seats facing a screen, or projection area, whose primary business is the exhibition to customers of motion pictures which are intended to provide sexual stimulation or sexual gratification to such customers and which are distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas.

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Applicant. The applicant for a permit shall be the intended operator of the enterprise.

* * *

Conduct any business in an enterprise. Any person who does any one (1) or more of the following shall be deemed to be conducting business in an enterprise:

(1) Operates a cash register, cash drawer or other depository on the enterprise premises where cash funds or records of credit card or other credit transactions generated in any manner by the operation of the establishment or the activities conducted therein are kept;

(2) Displays or takes orders from any customer for any merchandise, goods, entertainment or other services offered on the enterprise premises;

(3) Delivers or provides to any customer any merchandise, goods, entertainment or other services offered on the enterprise premises;

(4) Acts as a door attendant to regulate entry of customers or other persons into the enterprise premises; or

(5) Supervises or manages other persons in the performance of any of the foregoing activities on the enterprise premises.

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Director. The chief of police and such employee(s) of the police department as he may designate to perform the duties of the director under this article.

* * *

Employee. Any person who renders any service whatsoever to the customers of an enterprise or who works in or about an enterprise and who receives compensation for such service or work from the operator or owner of the enterprise or from the customers therein.

Enterprise. An adult bookstore, adult cabaret, adult encounter parlor, adult lounge, adult modeling studio, adult movie theatre or any establishment whose primary business is the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to its customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas. The term 'enterprise' shall not be construed to include:

(1) Any business operated by or employing licensed psychologists, licensed physical therapists, licensed athletic trainers, licensed cosmetologists, or licensed barbers performing functions authorized under the licenses held;

(2) Any business operated by or employing licensed physicians or licensed chiropractors engaged in practicing the healing arts; or

(3) Any retail establishment whose major business is the offering of wearing apparel for sale to customers.

Entertainment. Any act or performance, such as a play, skit, reading, revue, pantomime, scene, song, dance, musical rendition or striptease, whether performed by employees, agents, contractors, or customers. The term 'entertainment' shall also mean bartenders, waiters, waitresses, or other employees exposing specified anatomical areas or engaging in specified sexual activities in the presence of customers.

* * *

Operator. The manager or other natural person principally in charge of an enterprise.

Owner or owners. The proprietor if a sole proprietorship, all general partners if a partnership, or the corporation and all officers, directors, and persons holding fifty percent (50%) or more of the outstanding shares if a corporation.

Permit. A current, valid permit issued by the director pursuant to the terms of this article to an operator for an enterprise.

* * *

Specified anatomical areas:

(1) Less than completely and opaquely covered:

a. Human genitals, pubic region or pubic hair; or

b. Buttock; or

c. Female breast or breasts or any portion thereof that is situated below a point immediately above the top of the areola; or

d. Any combination of the foregoing; or,

(2) Human male genitals in a discernibly erect state, even if completely and opaquely covered.

Specified sexual activities:

(1) Human genitals in a discernible state of sexual stimulation or arousal; or

(2) Acts of human masturbation, sexual intercourse or sodomy; or

(3) Fondling or other erotic touching of human genitals, pubic region or pubic hair, buttock or female breast or breasts; or

(4) Any combination of the foregoing.

* * *

Sec. 28-125. Same — issuance or denial.

(a) Within twenty (20) days of receipt of any application, either original or renewal, the director shall grant or deny

the requested permit and give written notice to the applicant as to the decision, unless such time period is extended at the request of the applicant as provided in subsection (d), below.

(b) The director shall issue a permit to the applicant unless one (1) or more of the following conditions exist:

(1) The applicant's enterprise is located within ~~seven hundred fifty (750)~~ one thousand five hundred (1,500) feet of any school, church, public park, or licensed day-care center. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of such school, church, public park, or licensed day-care center;

(2) The applicant's enterprise is located within one thousand (1,000) feet of any other enterprise for which there is a permit. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of any other enterprise;

(3) Seventy-five (75) percent or more of the tracts within a circular area, as described herein, are residential in character. The radius of such circular area shall be one thousand five hundred (~~1,000~~ 1,500) feet, and the center of such circular area shall correspond to the midpoint of a line joining the two most distant

points on the boundary of the tract on which the enterprise is located; multifamily tracts shall be counted as multiple residential tracts based upon the tax records acreage of the multifamily tract according to the following formula; each one-eighth (1/8th) acre of land or fraction thereof shall be equivalent to one (1) residential tract. For purposes of this calculation a residential tract or multifamily tract shall be considered to be in the circular area in its entirety if any portion of it lies within the circular area;

(4) The applicant failed to supply all of the information requested on the application;

(5) The applicant gave materially false, fraudulent or untruthful information on the application;

(6) The applicant's enterprise is not in compliance with section 28-129 and section 28-130 of this ~~article~~ Code (the director may allow any noncompliance with section 28-129 or section 28-130 to be cured during the director's review period established in subsection (d), below, provided that it must be cured before the notice of decision on the permit is issued);

(7) The application or the enterprise does not meet any other requirement of this article;

(8) The operator has had a permit revoked for the same enterprise within the one-hundred-eighty-day period next preceding the date that the application was filed; or

(9) The applicant has not demonstrated that the owner of the enterprise owns or holds a lease for the property or the applicable portion thereof upon which the enterprise will be situated or has a legally enforceable right to acquire the same.

(c) Property uses and distances for original applications shall be determined as of the time that the application is filed. If a renewal application is timely filed as provided in section 28-124 of this Code, the property uses and measurements for the renewal application shall be determined as of the time that the original application for the enterprise was filed. If not timely filed, renewal applications shall be subject to the same fees and shall be treated in the same manner in all respects as original applications.

(d) In the event that the director determines that an applicant is not eligible for a permit, the applicant shall be given notice in writing of the reasons for the denial within twenty (20) days of the receipt of its application by the director, provided that the applicant may request, in writing, that such period be extended for an additional period of not more than ten (10) days at any time before the notice is issued in order to make modifications necessary to comply with section 28-129 or 28-130 of this Code. An applicant may appeal the decision of the director regarding such denial by filing a written request for a hearing with the director within ~~fifteen (15)~~ twenty (20) days after he is given notice of such denial. The director's decision on the application shall be final unless an appeal is timely filed. An appeal shall not stay the director's decision on the issuance of a permit. The applicant's written request for a hearing shall set out the

grounds on which the denial is challenged. The hearing shall be conducted by a hearing official ~~to be designated by the director~~ from a panel of hearing officials, not to exceed ten (10) in number, to be appointed by the mayor and confirmed by the city council. Such hearing officials shall be attorneys licensed to practice law in the state of Texas and shall serve without compensation. Hearings shall be conducted by each hearing official in rotation as appeals are filed. Should the hearing official next in rotation be unavailable or otherwise unable to hear an appeal within the time specified under this section, the hearing official next in order who is available shall be designated to hear such appeal. The hearing official shall not have participated in any investigation or decision relating to the denial of the permit. At the hearing the hearing official shall receive oral and written testimony regarding the application. Hearings shall be conducted under rules issued by the director, which shall be consistent with the nature of the proceedings and shall ensure that each party may present evidence, cross-examine witnesses and be represented by legal counsel. ~~Rule 12 of the city council's rules of procedure (section 2-2 of this code) shall be applicable.~~

(e) The hearing official shall conduct the hearing within ~~fifteen (15)~~ twenty (20) days after receipt of the applicant's written request for a hearing unless the applicant requests an extension in writing. The hearing official shall render a written decision and issue notice thereof to the applicant within five (5) days after the conclusion of the hearing. The written decision of the hearing official shall be final subject to the provisions of section 28-135 of this Code ~~unless an appeal is filed to the city council pursuant to section 28-125(f)~~.

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~~(f) An applicant who has complied with Rule 12 may appeal the decision of the hearing official to city council by filing a written notice of appeal with the city secretary within fifteen (15) days after the applicant is given notice of the hearing official's decision. The notice of appeal shall be accompanied by a memorandum or other writing setting out fully the grounds for such appeal and all arguments in support thereof. The director may submit a memorandum in response to the memorandum filed by the applicant on appeal to city council. After reviewing such memoranda, as well as the hearing official's written decision, and the exhibits introduced at the hearing before the hearing official, and the court reporter's record created pursuant to Rule 12, the city council shall vote to either uphold or overrule the hearing official's decision. Such vote shall be taken within fourteen (14) calendar days after the date on which the city secretary receives the notice of appeal. However, all parties shall be required to comply with the hearing official's decision during the pendency of the appeal.~~

(f g) Failure of the director to give timely notice of his action on an application, or failure of the hearing official to timely conduct or give notice of his decision on an appeal from the director's decision, ~~or failure of the city council to vote on an appeal from the decision of the hearing official within the limitations of time specified above,~~ shall entitle the applicant to the issuance of a temporary permit upon written demand therefor filed by the applicant with the director unless the delay resulted from a written request for a delay or deferral by the applicant. Such a temporary permit shall only be valid until the third day after the director gives

notice of his action on the application or the hearing official gives notice of his decision on the appeal, ~~or the city council votes on the appeal,~~ as applicable.

(g ~~h~~) In any instance in which the applicant's establishment is to be situated within one thousand (1,000) feet, as measured hereunder, from another proposed establishment for which a previously filed permit application has been denied, and the previously filed application is still subject to appeals, the director may grant the permit on a conditional basis, subject to the outcome of the appeals on the previous application. A permit so issued may be withdrawn and denied effective upon the third day after notice thereof is given to the operator following the resolution of the appeals on the prior permit. In case of denial the applicant shall have the same rights of appeal hereunder as if the permit had been denied in the first instance.

(h ~~i~~)The provisions of item (2) of subsection (b) of this section, above, shall not be construed to prohibit an enterprise for which there is a permit from relocating to another location situated within one thousand (1,000) feet of its existing location, provided that the proposed location complies with all applicable requirements of this article other than its proximity to its own existing enterprise location. An original permit application shall be required to be filed for the proposed relocation, and the director shall conditionally grant the application, if granted, on the stipulation that the permit will not actually be issued until the applicant discontinues operation at its existing location and surrenders the permit for its existing location. Any such relocation must be completed within one hundred eighty (180) days from the

date that the permit is conditionally granted or the conditional grant of the application will become void. Pending the removal of the enterprise to its new location, both the old and new locations shall be deemed to be operating under a permit for purpose of measurements to locations of other proposed enterprises for which applications may be filed.

* * *

Sec. 28-135. Judicial review.

(a) Any owner, operator, or applicant of an enterprise who is aggrieved by a decision that denies, suspends, or revokes a permit, and who has complied fully and timely with all applicable provisions pertaining to appeals of decisions in this article may seek appropriate judicial relief by writ of mandamus or other available remedy in a court of competent jurisdiction.

(b) The person aggrieved by the decision of the city may seek judicial review of such decision immediately following the decision. The city attorney shall cooperate with the aggrieved party in seeking an expedited disposition of the matter.

(c) The decision of the hearing official suspending or revoking a permit under section 28-127 of this Code shall be final as of the date written notice of the hearing official's decision is given to the owner or operator of the enterprise, but in order to afford the permit holder an opportunity to seek judicial review shall not be effective for purposes of enforcement of the decision by the director until the twentieth

(20th) day following such notice. If the permit holder initiates litigation for the purpose of seeking judicial review within the twenty (20) day period, then the decision shall not be effective for purposes of enforcement prior to the sixtieth (60th) day following such notice. This subsection shall apply only to a decision sustaining the suspension or revocation of a permit for an existing enterprise, and shall not apply to a decision sustaining the denial of an initial application for a proposed enterprise.

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